No. 16,056

IN THE

United States Court of Appeals

For the Ninth Circuit

CLAUDIA WALLER WALKER,
Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, and TRANSAMERICA CORPORATION,
Appellees.

BRIEF OF APPELLEE TRANSAMERICA CORPORATION.

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STATEMENT OF THE CASE.

The complaint in this case was filed October 24, 1955, although the controversy had its origin in 1939, when Miss Walker's mother had her "committed to the Stockton State Hospital." *In re Walker,* 32 Cal. 2d 488, 490. Miss Walker claims that the nervous or mental ailment upon which the commitment was based was caused by the conditions of her employment with Transamerica and Bank of America (Complaint, para. IX (at p. 9)) and draws the conclusion that she should have been allowed workmen's compensation. Complaint, para. V. She alleges Transamerica

and Bank of America concealed this from her until 1948. Complaint, paras. V, X (at p. 23). She admits that she filed a claim with the Industrial Accident Commission which was denied in 1949 and that this denial was affirmed without opinion by the California Supreme Court. Complaint, para. X (at pp. 23-24); [Second] Amendment to Complaint, para. XXII (at p. 13).

Miss Walker attempts to avoid the bar of the statute of limitations by alleging that, although she knew in 1948 she might have a right to workmen's compensation (Complaint, para. X (at p. 23)), she did not have the evidence to support her claim until 1953. Complaint, para. IV. She alleges that this evidence consists of a letter which Arthur Brouillet wrote to a Transamerica employee in 1939 regarding her need for medical care. Complaint, para. IV. Mr. Brouillet was the attorney for her mother as guardian of Miss Walker. The complaint alleges that the existence of this correspondence was denied by Mr. Brouillet in a proceeding before Judge Fitzpatrick in the Probate Department of the Superior Court in San Francisco, and that she was unable to secure this correspondence until 1953, after the death of Mr. Brouillet. Complaint, para. IV. She claims that this "concealment" by Mr. Brouillet tolled the statute as to Transamerica and Bank of America.

Miss Walker asks $1,000,000 general damages and specific damages of $56,996, including damages for such items as voice training, rents and subsidies in Alabama, losses on securities and real estate in Cali-

fornia, and an insurance policy taken by Mr. Brouillet in the "illegal guardianship proceeding." Complaint, paras. XI, XII. Although only Transamerica and Bank of America are joined in this action, the complaint is replete with alleged acts by others, including Stanford-Lane Hospital, judges of California courts, a former governor of California, a former district attorney of San Francisco, a former United States attorney in San Francisco, her former physician, Melvin Belli, and J. Edgar Hoover. Complaint, para. X.

The original complaint attempted to use diversity of citizenship as the basis for jurisdiction in the federal court, although Bank of America is a national banking association located in California, and Miss Walker is a citizen of California. Complaint, para. III. Transamerica is a Delaware corporation. Complaint, para III. Shortly after filing the original complaint, Miss Walker filed an amendment claiming jurisdiction in the federal court under a civil rights statute (42 U.S.C. 1985 (3)), which applies to conspiracies to deprive persons of equal protection of the laws. [First] Amendment to Complaint, para. XV. Miss Walker later filed a second amendment alleging that Bank of America was a mere instrumentality of Transamerica. [Second] Amendment to Complaint, para. XVI. She asserted that therefore only the citizenship of Transamerica should be considered for purposes of diversity jurisdiction.

Motions to dismiss were made. The district judge filed an order on January 28, 1955 dismissing the ac-

tion for lack of jurisdiction. Thereafter, Miss Walker filed various motions for additional relief, including a motion for leave to file an amended complaint dropping Bank of America as a defendant. The district judge made a minor correction in one order, but except for that, denied all of these subsequent motions and denied the request for permission to file an amended complaint. The district judge said that Miss Walker could not now ignore Bank of America which she has heretofore pursued with such vigor. The district judge also held that it appears on the face of the proposed amended complaint Miss Walker's claim for relief is barred by the statute of limitations. The district judge pointed out that Miss Walker has admitted that she was aware of the claim in 1948 and did not file this action until October 24, 1955.

ARGUMENT.

Miss Walker is a citizen of California. Bank of America, which is an indispensable party, is a national banking association located in California and is therefore also a citizen of California. Under these circumstances, the district court could not have jurisdiction based upon diversity of citizenship.

The amendment attempting to add the civil rights statute to the complaint did not cure the jurisdictional defect because it applies only to persons acting or purporting to act under state law. Moreover, the conspiracy which Miss Walker attempts to allege would

not be a conspiracy to deprive her of equal protection of the laws, as required by the statute.

The original complaint was based upon the theory that Transamerica and Bank of America had a specific duty to tender medical care to Miss Walker and to inform her mother, who was then her guardian, that the right to workmen's compensation benefits existed. Miss Walker alleges that this specific duty arises under California Workmen's Compensation Law. We find no authority for such specific duty and there can be no cause of action for breach of a nonexistent duty. In any event, Miss Walker's right to workmen's compensation was determined against her by the Industrial Accident Commission and this decision became final on appeal. This court cannot at this time and in this proceeding review that decision.

Finally, even if Miss Walker at one time had a cause of action which she could maintain in the federal courts, it is barred by the statute of limitations, in view of her admission that she learned of the cause of action in 1948, seven years before she filed the complaint in this action.

A. NEITHER THE ORIGINAL COMPLAINT, AS AMENDED, NOR THE PROPOSED AMENDED COMPLAINT CONTAIN SUFFICIENT JURISDICTIONAL ALLEGATIONS.

1. The Original Complaint, as Amended, Did Not Show Diversity Jurisdiction.

The original complaint alleges that appellant is a citizen of California, appellee Transamerica is a Delaware corporation, and appellee Bank of America is a

national banking association. This appears to be an attempt to establish diversity jurisdiction under 28 U.S.C. §1332. However, for jurisdictional purposes, a national bank is a citizen of the state in which it is established or located. 28 U.S.C. §1348; *Cope v. Anderson,* 331 U.S. 461, 467.

Here, by not alleging that Bank of America maintains its principal place of business in a state other than California, appellant has failed to establish diversity jurisdiction as to Bank of America. It is well settled that if the plaintiff is of the same citizenship as any one of the defendants, there can be no diversity jurisdiction because diversity must be complete. *Baltimore & Ohio R. Co. v. Parkersburg,* 268 U.S. 35. Therefore, diversity jurisdiction is absent in the original complaint.

2. Appellant's Allegations in the Second Amendment to the Original Complaint That Bank of America Is a Mere Instrumentality of Transamerica Do Not Aid Her in Establishing Jurisdiction.

Appellant has alleged that Bank of America is a mere instrumentality of Transamerica and hence that the citizenship of Bank of America should be disregarded in determining whether the necessary diversity of citizenship exists. The district court appropriately disposed of this contention in its memorandum opinion of January 28, 1958, as follows:

> "Plaintiff has urged that defendant Bank of America is a 'subsidiary', 'a mere instrumentality' of defendant Transamerica, that Transamerica is 'the real party defendant', and has asked that the

Court ignore the Bank of America as a legal entity. Disregarding the question of whether the doctrine of the law of Corporations known as 'Alter Ego' or 'Piercing the Corporate Veil' will apply equally well to an unincorporated banking association as to a corporation, there are not sufficient allegations in any of plaintiff's pleadings to suggest that the Bank of America is not an identifiable and separate legal entity, nor that the Court would be justified in submerging the identity of Bank of America within that of Transamerica. Indeed, inasmuch as plaintiff has named the Bank of America as a party defendant in her action, there is no need for the Court to make such a finding as she proposes. The Court will not base jurisdiction on the ground that one of the named defendants it [sic] no defendant at all."

3. Appellant Failed in Her Amendments to the Original Complaint to Show Jurisdiction Under 28 U.S.C. §1343, Concerning Violations of Civil Rights Statutes.

Section 1343 of Title 28 of the United States Code provides in part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;"

42 U.S.C. §1985(3) provides:

"If two or more persons . . . conspire . . . for the purpose of depriving, either directly or in-

> directly, any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Of course, in order for there to be jurisdiction under section 1343 of Title 28, the complaint must state a claim under section 1985(3) of Title 42. This appellee submits that no such claim is stated.

In the first place, appellees are not alleged to have been state officers nor are they alleged to have acted pursuant to state law. The complaint is therefore deficient for failure to allege state action by appellees. *Davis v. Foreman* (7th Cir.), 251 F. 2d 421; *Williams v. Yellow Cab Co. of Pittsburgh, Pa.* (3 Cir.), 200 F. 2d 302; see, also, *Collins v. Hardyman,* 341 U.S. 651.

Moreover, even if there were no requirement of state action, the acts alleged to have been done by appellees would not be violations of section 1985(3) because they would not be acts depriving appellant of equal protection of the laws, as required by the statute. This point was made by the United States Supreme Court in *Collins v. Hardyman, supra,* which involved an at-

tack by a group upon a public meeting held to discuss national issues and petition the government. There the Court stated at pages 661-662:

> "The only inequality suggested is that the defendants broke up plaintiffs' meeting and did not break up meetings of others with whose sentiments they agreed. To be sure, this is not equal injury, but it is no more a deprivation of 'equal protection' or of 'equal privileges and immunities' than it would be for one to assault one neighbor without assaulting them all, or to libel some persons without mention of others. Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so. Plaintiffs' rights were certainly invaded, disregarded and lawlessly violated, but neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights *under the laws* and to *protection of the laws* remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as those of any other citizen who suffers violence at the hands of a mob."

The same point was made in *Whittington v. Johnston* (5th Cir.), 201 F. 2d 810, a case the facts of which, in the words of the court below, are "remarkably similar" to those alleged by appellant. There the plaintiff complained that the defendants had conspired to, and did, cause her to be declared insane by an Alabama Probate Court when she was in fact sane, and caused her to be confined and denied her right to

be heard. She sued under what is now section 1985(3). The Court said at page 811:

> "That section, so far as here material, does not attempt to reach a conspiracy to deprive one of civil rights unless its object is a deprivation of equality,—of 'equal protection of the laws', or 'equal privileges and immunities under the laws'. Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253. It does not purport to create a cause of action for conspiracies to deny due process. Yet the burden of the conspiracy counts is, not that the defendants conspired to deny plaintiff equality under the law, but that they conspired to deprive plaintiff of her liberty without due process. The two propositions are quite distinct. They are not equivalents. Mitchell v. Greenough, 9 Cir., 100 F.2d 184; McShane v. Moldovan, 6 Cir., 172 F.2d 1016; Allen v. Corsano, D.C., 56 F.Supp. 169. No facts are pleaded which show that plaintiff has been subjected to any inequality of treatment. There is no charge that by said proceedings she has been subjected to any different or greater hazard than any other person against whom the Alabama statutes might be invoked, nor that she was deprived of any right or immunity which might be enjoyed by any other person under the law. It is clear that the conspiracy counts state no cause of action under 8 U.S.C.A. §47(3). Collins v. Hardyman, supra."

4. Appellant's Allegations That Appellees Violated Federal Banking Statutes Do Not Show Jurisdiction.

Throughout appellant's original complaint and her proposed amended complaint there are allegations that appellees violated the national banking laws. Appar-

ently appellant believes that such allegations give her jurisdiction to sue in the federal courts. [Second] Amendment to Complaint, para. XVIII. Obviously, she is in error. Only the Comptroller of Currency can complain of such acts. 12 U.S.C. §93.

5. To the Extent That Appellant Relies Directly Upon Rights Accorded Her by the California Workmen's Compensation Law, the District Court Had No Jurisdiction.

Much, if not all, of appellant's claims boils down to an assertion of rights under the California Workmen's Compensation Law. The District Court has no jurisdiction over such claims. The reasons why are, for convenience, set forth in part B, *infra,* discussing appellant's failure to state a claim upon which relief can be granted.

6. The Elimination of Bank of America as a Defendant in the Proposed Amended Complaint Does Not Aid Appellant in Establishing Diversity Jurisdiction.

In the proposed amended complaint appellant, a citizen of California, sues only Transamerica, which is a Delaware corporation. It was her contention that by eliminating Bank of America, which for purposes of diversity jurisdiction is deemed a citizen of California (see *supra*), she had established the complete diversity necessary to sustain jurisdiction. The District Court correctly ruled, however, that it appeared from appellant's prior pleadings that Bank of America was an indispensable party. Under such circumstances, there can be no jurisdiction, although Transamerica is sued alone. 54 Am.Jur., United States Court, §66.

B. THE ORIGINAL COMPLAINT, AS AMENDED, AND THE PROPOSED AMENDED COMPLAINT EACH FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The original complaint, as amended, and the proposed amended complaint are so nearly identical in most respects that it is convenient to consider them together in determining whether appellant did or could state a claim upon which relief could be granted. The only exception concerns appellant's attempt to state a claim based upon 42 U.S.C. §1985(3), the civil rights statute. This is contained in the amendments to the original complaint, but is omitted from the proposed amended complaint. That appellant has not stated a claim under that section is, we believe, amply demonstrated in the part of this brief regarding the absence of jurisdiction, *supra*. Appellant's other asserted claims are also without merit.

1. Appellant Cannot State a Claim Against Appellees for Violation of a Duty to Tender Medical Care to Appellant in 1939.

Appellant seems to take the position that under the California Workmen's Compensation Law appellees were obligated to provide her with medical care upon learning of her illness. Appellant fails to cite any case holding that an employer is liable under the California Workmen's Compensation Law for an employee's mental disability not caused by a physical injury incurred in his employment, and this appellee knows of no such case. Appellant's pleadings, therefore, fail to set forth sufficiently her right ever to have received workmen's compensation benefits.

Assuming, however, for the purpose of argument, that appellant suffered a compensable injury, what were her rights under the Workmen's Compensation Law? Section 4600 of the California Labor Code provides in part:

> "Medical, surgical, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including artificial members, which is reasonably required to cure or relieve from the effect of the injury shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment."

It is apparent from the second sentence quoted above that an employer's liability for failure to provide medical treatment stands on no different footing than any other compensation payable under the Workmen's Compensation Law. See, also, Labor Code §§ 3207, 5001. Damages for failure to provide medical treatment could be obtained only through the same procedures as would be used to obtain other workmen's compensation benefits, that is, by a proceeding before the Industrial Accident Commission. Labor Code, §§ 5300, 5304. The Industrial Accident Commission's jurisdiction is exclusive. See *Hazelwerdt v. Industrial Indemn. Exchange,* 157 Cal. App. 2d 759, and cases cited therein. Therefore, appellant has no claim which she may assert in the federal courts. It is true that in some states which provide for enforce-

ment of their workmen's compensation acts by resort to the courts of such states, resort may be had to the federal courts where there is diversity. However, it has always been understood that in states which provide an administrative remedy, such as California, the federal courts will not take the case except in the form of an appeal from the administrative determination (see *Fresquez v. Farnsworth & Chambers Company* (10th Cir.) 238 F. 2d 709; *Valencia v. Stearns Roger Mfg. Co.* (D.C.N.M.), 124 F. Supp. 670), if, in fact, the federal courts will touch the case at all. See *Decker v. Spicer Mfg. Division of Dana Corp.* (D.C. N.D. Ohio) 101 F. Supp. 207.

Finally, it appears from her pleadings that appellant has already litigated her workmen's compensation rights before the Industrial Accident Commission and the California courts and the litigation was determined adversely to her. She is therefore barred by principles of *res judicata* from relitigating her claims.

2. The Allegations in Appellant's Pleadings That Appellees Failed to Advise Her Mother of Her Alleged Workmen's Compensation Rights Fail to State a Claim Upon Which Relief Can Be Granted.

It appears from the Brouillet letters quoted in the original complaint that when one Lockhart (who is alleged to have been a Transamerica employee) was advised by Brouillet that appellant required some funds for treatment, Lockhart replied that appellant's former co-workers were unwilling to make any contribution. Appellant says that by failing to advise her mother at that time that appellant was entitled to

workmen's compensation benefits, appellees committed fraud. We have not, however, found any authority to indicate that an employer is obligated to inform an injured employee of his workmen's compensation rights.

Appellant goes a step further in her proposed amended complaint and alleges that her employers acting by and through Lockhart advised her mother that appellant was entitled to no benefits. She does not say that appellees advised her mother that she was not entitled to workmen's compensation benefits, but simply that she was entitled to no benefits. It would seem from the Brouillet letters quoted in the original complaint that Lockhart clearly meant that she was not entitled to any *charitable* benefits. But even if appellant should allege that appellees advised her mother that appellant was not entitled to any workmen's compensation benefits, this would not constitute an actionable misrepresentation if it were false because it would be a representation of *opinion* and of *law* (made by a layman to her mother's lawyer). Moreover, by the very nature of the representation it could not be known to be false because it could not be certain that appellant had incurred her disability as a result of her work or that if she had she would have been entitled to benefits.

Finally, it would appear that the fraudulent concealment of a cause of action does not create a new cause of action, but merely extends the statute of limitations as to the concealed cause of action. Thus it is held that where a defendant fraudulently conceals

from plaintiff the fact that he has a cause of action, the statute of limitations is the statute for the concealed cause of action and not the fraud statute, although like the fraud statute it does not begin to run until "discovery". 1 Witkin, California Procedure, Actions, § 173, p. 686. The significance of the distinction is that if no new cause of action is created, then the proper forum is the Industrial Accident Commission because the complaint is essentially based upon the Workmen's Compensation Law and not upon the law of fraud.

3. Appellant Has Not Stated a Claim Upon the Basis of Allegations That Appellees Concealed the Evidence That Her Mother Had Given a Notice of Illness to Appellees in 1939.

Appellant has alleged that she was unable to establish her workmen's compensation claim in 1948 because she was unable to prove that a notice of her illness had been given to her employers in 1939. She claims that such notice was contained in a letter from Brouillet to Lockhart, an employee of appellees. In her proposed amended complaint she has alleged in addition that her claim was denied in 1948 because it had not been filed in 1939. The latter allegation apparently has reference to the fact that appellant's claim was barred for failure to commence proceedings within one year after the injury, as required by Labor Code § 5405. See, also Labor Code §§ 5407, 5408. While appellant suffered her injury no later than 1939, she commenced her proceedings no earlier than 1948. Her action was therefore barred regardless of whether she had evidence of notice. Hence, she can-

not predicate a cause of action on the alleged concealment of the evidence of notice.

Even if appellant's claim had not been barred by the one year statute of limitations, evidence of the letter which she asserts was "notice" would not have aided her in establishing her claim. The relevance of notice is explained in Labor Code § 5400, which provides in part:

> "* * * [N]o claim to recover compensation under this division shall be maintained unless within 30 days after the occurrence of the injury which is claimed to have caused the disability * * * there is served upon the employer notice in writing signed by the person injured or someone in his behalf, * * *."

However, it is not any notice which will suffice. The notice must contain certain facts under Labor Code § 5401, which provides:

> "The notice shall state:
>
> (a) The name and the address of the person injured.
>
> (b) The time and the place where the injury occurred.
>
> (c) The nature of the injury."

The quotations of the letter from Brouillet to Lockhart in the original complaint do not indicate that the above requirements of a valid notice were met.

In addition, it is provided in Labor Code § 5402 that knowledge by the employer of a claim of injury received from any source is equivalent to notice under

section 5400. Labor Code § 5403 provides that the failure to give notice is not a bar to recovery if the employer was not in fact misled or prejudiced by the failure. Appellant asserts that appellees should have advised her of her workmen's compensation rights. How could they have done so if they did not know she was injured in connection with her employment? And if they knew such fact, how could they have been prejudiced by not receiving the notice? If they were not prejudiced, the fact of whether notice was given or not would be immaterial.

Furthermore, it would seem that regardless of whether or not there was in fact notice as contemplated by section 5400, appellant is conclusively barred from showing that such notice was given because the determination in the Industrial Accident Commission proceedings that notice was not given is *res judicata* or at least operates as a collateral estoppel. See "Res Judicata as regards decisions or awards under the workmen's compensation acts", 122 A. L. R. 550; see also, *Scott v. Industrial Acc. Com.,* 46 Cal. 2d 76; *French v. Rishell,* 40 Cal. 2d 477; *Duprey v. Shane,* 39 Cal. 2d 781; *Liberty Mut. Ins. Co. v. Superior Court,* 62 Cal. App. 2d 601; *Godman Bros. v. Superior Court,* 51 Cal. App. 2d 297.

Appellant alleges that Brouillet falsely testified that the alleged notice had not been given. She does not allege that at any time she believed or relied upon Brouillet's testimony. Furthermore, appellant should be deemed to know what her mother as her agent knew. Since she alleges that it was her mother who

contacted appellant's employers, her mother must have known all about the notice. Moreover, plaintiff admits in her pleadings that she knew of the alleged notice in 1948. Hence she can not have relied on Brouillet's testimony.

It is plain, therefore, that any cause of action which appellant might have based upon the Brouillet testimony is not for fraud in the conventional sense. Instead, it seems that plaintiff seeks to predicate her action simply on the alleged fact that Brouillet committed perjury. The law, however, does not provide for such an action in the absence of statute. 38 Cal. Jur. 2d, Perjury, § 53.

C. ANY ACTION WHICH APPELLANT MIGHT HAVE HAD IS BARRED BY THE STATUTE OF LIMITATIONS.

1. The Civil Rights Action Is Barred by the Statute of Limitations.

Appellant's claim based upon 42 U.S.C. § 1985(3), the civil rights statute, is barred by the statute of limitations. Since there is no federal statute of limitations applicable to the civil rights statutes, it has been held that the state statute of limitations applies. *O'Sullivan v. Felix,* 233 U.S. 318; *Wilson v. Hinman* (10th Cir.), 172 F. 2d 914; *Gordon v. Garrson* (D.C. E.D. Ill.), 77 F. Supp. 477.

There are several California statutes that could conceivably govern: Code of Civil Procedure § 338(1)—an action upon a liability created by statute, other than a penalty or forfeiture; Code of Civil Procedure § 338(4)—fraud; Code of Civil Procedure § 339(1)—

an action upon a liability not founded upon an instrument in writing; Code of Civil Procedure §343—an action not otherwise provided for. The longest period provided is four years. Thus any action which appellant might have had upon the basis of the civil rights statute expired in 1943 at the latest.

2. Any Claim Which Appellant Might Have Which Is Before the Court on Diversity Jurisdiction Is Also Governed by California Law With Respect to the Statute of Limitations.

In addition to controlling with respect to the statute of limitations for the civil rights action, California law also governs as to the period of limitations for any action appellant might have had where jurisdiction is based on diversity of citizenship. *Guaranty Trust Co. v. York,* 326 U. S. 99; *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U. S. 530. Accordingly, we must look to California law to determine if any claim appellant might have had based upon the Workmen's Compensation Law or based upon fraud is barred.

3. Any Action Based Upon a Claim for Workmen's Compensation Is Barred by the Statute of Limitations.

Any action which appellant might have been able to bring upon the basis of the Workmen's Compensation Law expired at the latest in 1940 under Labor Code §§ 5405, 5407, 5408.

4. Any Action Which Appellant Might Have Had for Fraud Is Barred by the Statute of Limitations.

The acts which appellant alleges constituted fraud by appellee occurred in 1939. Subsection 4 of section

338 of the Code of Civil Procedure provides a three year statute of limitations for actions grounded upon fraud. Any action which appellant might possibly have had for fraud was therefore *prima facie* barred in 1942.

However, the statute also provides that "[t]he cause of action in such case [shall] not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud . . ." This discovery provision has been interpreted in many California cases. These cases hold that the statute commences running when the plaintiff in the exercise of reasonable diligence should have discovered his cause of action. They also lay down strict rules regarding the pleading of discovery. This has been summarized in 1 Witkin, California Procedure, Actions, § 143, pp. 652-653:

> "C.C.P. 338(4) adds the statement (commonly found in fraud statutes of limitation: see 63 Harv. L. Rev. 1217): 'The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.' Literally interpreted, this language would give the plaintiff an unlimited period to sue if he could establish ignorance of the facts. But the courts have read into the statute a duty to exercise diligence to discover the facts. The rule is that the plaintiff must *plead and prove the facts* showing: (a) Lack of knowledge. (b) Lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date). (c) How and when he did actu-

> ally discover the fraud or mistake. Under this rule constructive or presumed notice or knowledge are equivalent to knowledge. So, when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his investigation (such as public records or corporation books), the statute commences to run. Many cases, both old and new, strictly apply these requirements to bar actions brought after lapse of the 3-year period. . . ."

Witkin cites an army of cases for the above statements, including the oldest and best known, *Lady Washington Consol. Co. v. Wood,* 113 Cal. 482. The California rules for pleading discovery, of course, apply in the federal courts when the California statute of limitations is applicable. *Prentiss v. McWhirter* (9th Cir.), 63 F. 2d 712; *Sears, Roebuck & Co. v. Blade* (D.C.S.D. Cal.), 123 F. Supp. 131.

Appellant has not alleged lack of knowledge of the facts as she must in order to escape the bar of the statute of limitations. More important, her pleadings clearly show that she could not amend to allege lack of knowledge, for she had already affirmatively alleged that she knew of the asserted fraud in 1948. It is true that she has alleged that she was unable to obtain the evidence she thought would substantiate her claims until 1953. However, as the District Court correctly pointed out in its order denying appellant's motion to file her proposed amended complaint, the statute of limitations for an action within a plaintiff's knowl-

edge is not tolled while he searches for evidence to support it. The court stated:

> "It is true that fraudulent concealment of a claim for relief is sufficient to toll the statute of limitations. *Kimball v. Pacific Gas & Electric Co.*, 220 C. 203. However, it is also true that the statute governing the commencement of actions will start to run when the plaintiff becomes aware of the claim for relief. The plaintiff has here confused the discovery of the claim for relief with the discovery of the evidence which would substantiate that claim.
>
> "Consequently, inasmuch as it appears affirmatively from the face of the proposed amended complaint that plaintiff was aware of her claim for relief in 1948, but did not file the action until 1955, that the claim is barred by California Code of Civil Procedure § 338[4]."

5. The Statutes of Limitation for Actions Not Based Upon Fraud Commenced Running at the Latest in 1948.

It is true that the statute of limitations for actions not themselves based upon fraud may be tolled by fraudulent concealment of the causes of action. However, the pleading requirements for tolling the statute for fraudulent concealment are the same as the pleading requirements where an action for fraud is brought more than three years after the fraud. See 1 Witkin, California Procedure, Actions, § 173, pp. 685-686; 31 Cal. Jur. 2d, Limitation of Actions, § 202. Consequently, the period of limitations for *any* action appellant might have had would have commenced running at the latest in 1948, when appellant admittedly knew of her alleged cause of action.

6. The Defense of the Statute of Limitations May Be Raised by a Motion to Dismiss.

Where a complaint shows on its face, as all of appellant's pleadings did, that the statute of limitations has run, it fails to state a claim upon which relief can be granted. Consequently, the defense of the statute of limitations in such instances may be raised by a motion to dismiss. *Sukow Borax Mines Consolidated v. Borax Consolidated* (9th Cir.), 185 F. 2d 196; *Kincheloe v. Farmer* (7th Cir.), 214 F. 2d 604; *Gossard v. Gossard* (10th Cir.), 149 F. 2d 111; *Sears, Roebuck & Co. v. Blade* (D.C.S.D.Cal.), 123 F. Supp. 131; *Abram v. San Joaquin Cotton Oil Co.* (D.C.S.D. Cal.), 46 F. Supp. 969.

D. THE MOTION TO DISMISS WAS FILED WITHIN THE ALLOWABLE PERIOD.

Since this appellee's motion to dismiss was filed within the time extended by the District Court, there can be no question of any of its rights being waived by failure to plead within twenty days of the service of the complaint. Moreover, lack of jurisdiction and failure to state a claim are never waived.

CONCLUSION.

Appellant's pleadings fail to show jurisdiction in the federal courts. Moreover, they fail even to allege a claim upon which relief could be granted in any court, federal or state. Most important, they affirma-

tively show that under no circumstances could appellant amend to cure these defects. Accordingly, appellee Transamerica Corporation requests that the order of the District Court dismissing appellant's action be affirmed.

Dated, December 23, 1958.

Respectfully submitted,

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